CQ507

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Subject: NEPA Task Force Comments

Attached are the comments of the American Forest & Paper Association to the Notice and Request for Comments of the National Environmental Policy Act Task Force, published in the Federal Register on July 9, 2002. Please include these comments in the record of public comments.

<<Final CEQ NEPA Comments.doc>>

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AMERICAN FOREST & PAPER ASSOCIATION

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CQ507

September 24, 2002

NEPA Task Force
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To Whom It May Concern:

Enclosed are the comments of the American Forest & Paper Association in response to the Notice and Request for Comments of the National Environmental Policy Act Task Force, Council on Environmental Quality (CEQ), published in the Federal Register on July 9, 2002 (67 Fed. Reg. 45510-45512).

We appreciate the opportunity to provide detailed comments regarding ways that CEQ could improve and modernize NEPA analyses and documentation. This is an important question and we hope that CEQ will consider input from the public and move expeditiously to implement changes so that agency compliance with NEPA is less time-consuming, less expensive, while retaining the important public disclosure aspect of NEPA.

If you have any questions regarding our response, please call Mary Coulombe at 202-463-2752.

Sincerely,

/s/ John Heissenbuttel

John Heissenbuttel
Vice President
Forest and Wood Products

CQ507

COMMENTS OF
THE AMERICAN FOREST AND PAPER ASSOCIATION
TO THE
NATIONAL ENVIRONMENTAL POLICY ACT TASK FORCE,
COUNCIL ON ENVIRONMENTAL QUALITY

The American Forest and Paper Association (AF&PA) presents these comments in response to the Notice and Request for Comments of the National Environmental Policy Act Task Force, Council on Environmental Quality (CEQ), published in the Federal Register on July 9, 2002 (67 Fed. Reg. 45510-45512).

AF&PA is the national trade association for the forest, pulp, paper, paperboard, and wood products industry throughout the United States. AF&PA currently represents approximately 130 member companies that grow, harvest, and process wood and wood fiber; manufacture pulp, paper, and paperboard products from both virgin and recovered fiber; produce solid wood products; and import and export unmanufactured wood products. AF&PA also represents more than 60 affiliate member associations that reach out to more than 10,000 companies across the nation. Its members include companies that regularly bid on, and have carried out, U.S. Forest Service timber sale projects in the national forests.

AF&PA compliments the CEQ for the decision to establish the National Environmental Policy Act (NEPA) Task Force and to provide the NEPA Task Force (Task Force) with a wide-ranging mandate that begins with the direction "to seek ways to improve and modernize NEPA analyses and documentation." The Federal Register notice states that the Task Force will complete two assignments within six months: (1) "prepare a publication highlighting case studies and ... best practices"; and (2) "make recommendations to CEQ regarding potential guidance and potential regulatory changes based upon the information collected."

At the risk of getting ahead of ourselves and presupposing an outcome before the analyses and Task Force documentation are complete (always a risk where NEPA is concerned), AF&PA would like to go on record as stating that CEQ has properly identified itself as the best recipient of the Task Force recommendations and appropriately suggested that a second critical step will be to convert the recommendations to CEQ regulations and guidance. Indeed, the success of the Task Force and this CEQ initiative will be measured by the degree to which that second step is accomplished.

AF&PA recognizes that the brevity of NEPA has accorded almost unparalleled opportunities to the federal courts to shape that law. The price for providing the courts with those opportunities has been steep — holding countless Federal projects, permits, and other actions hostage to inevitably lengthy litigation processes, and continual (and occasionally contradictory) changes in NEPA implementation requirements in court orders and opinions. Those changes often remain hidden from federal officials responsible for NEPA documentation and are not developed by the CEQ, the expert agency tasked with oversight of NEPA implementation.

However, it is not simply the statute that has occasioned so much litigation. CEQ's efforts to fulfill its NEPA oversight role also have been marched up the courthouse steps. In recent years, a significant percentage — if not most — of the NEPA lawsuits have been based on alleged violations of CEQ's regulations. The CEQ regulations, promulgated under the authority granted to CEQ by Executive Order 11991 (42 Fed. Reg. 26967 (May 24, 1977)), also have presented abundant opportunities for lawsuits because they established numerous litigation targets — elaborate procedures (*e.g.*, multiple public comment opportunities); requirements for additional documentation (*e.g.*, Environmental Assessments (EAs) and Findings of No Significant Impacts (FONSIs)); and expansive but vague analytical requirements (*e.g.*, the content, and geographical and temporal scope, of analyses of cumulative impacts, connected actions and indirect effects). When the CEQ has attempted to reduce complexities or ambiguities arising from case law or its own regulations, it typically has done so through guidance documents (*e.g.*, "Forty Most Asked Questions," 46 Fed. Reg. 18026 (1981); "Incorporating Biodiversity Considerations Into Environmental Impact Analysis Under NEPA" (1993); and "Considering Cumulative Effects Under The National Environmental Policy Act" (1997)). These documents, however, lack the force and effect of law and have been virtually ignored by the courts. Yet, on at least one occasion — deletion of the worst case analysis requirement (51 Fed. Reg. 15625 (1986)) — CEQ has demonstrated that use of its rulemaking authority can lessen substantially the analytical burdens associated with NEPA documentation and the litigation vulnerability of those documents. Likewise, judicious CEQ rulemaking could reduce NEPA procedural burdens and the litigation vulnerability they present.

Given our view as to the importance of formalizing the Task Force's recommendations in CEQ guidance and, preferably, rules, these comments will focus on changes that can best be reflected in such regulatory actions. As a national trade association that engages in policy analysis and litigation, we have observed more frequently the sins, not the virtues, of NEPA implementation. Accordingly, in these comments we will concentrate on the policy and regulatory reforms we believe necessary to ensure that NEPA fulfills its mission without undue interference with and delay of agency decisions and actions. We will defer to others' comments to supply the anecdotal examples of a properly functioning NEPA, although we suspect that CEQ's present rules — as they read and as they are interpreted by courts — have resulted in a relative scarcity of models for desired future NEPA behavior.

We will focus our comments on issues raised under sections "C. Programmatic Analysis and Tiering", "F. Additional Areas for Consideration" (where we will address "the appropriate utility of and structure of format for environmental assessment documents" (EAs) and also Environmental Impact Statements (EISs) and discuss alternative NEPA arrangements in emergency situations), "E. Categorical Exclusions", and "D. Adaptive Management/Monitoring and Evaluation Plans" in the Federal Register notice. We have organized our comments in this way because it allows us to talk about NEPA documents in descending order of content and procedural complexity.

"C. Programmatic Analysis and Tiering."

Problems with Programmatic EISs and Tiering. AF&PA believes that both programmatic EISs and the tiering concept have proven to be unwieldy and of little utility. Programmatic EISs often

are uninformative, certainly when compared to the expenditure of staff time and funding involved in their preparation, because they are so far removed in geographical scale or time from the Federal agency actions that will actually produce environmental effects. Replete with assumptions and abundant use of the subjunctive, they constitute little more than official soothsaying. Such "analytical" speculation accomplishes little in informing either the responsible agency or the public concerning subsequent project-level decisionmaking. The lack of sufficient substance on which to ground project-level decisions makes tiering difficult. Even if the programmatic EIS is well-structured for tiering, the considerable time it takes to prepare it, followed by the time necessary to design projects and then conduct the further NEPA documentation on them, too often renders the programmatic EIS too stale to serve as the basis for tiering — forcing those responsible for drafting the projects' NEPA documents to prepare stand-alone EAs or, worse, EISs.

Suggestions for Programmatic EISs. Section 102(2)(C) of NEPA applies to "Federal actions." At a minimum, then, programmatic EISs should be prepared only on those programs which the courts recognize as Federal actions subject to judicial review. For the same reason that the courts refuse to consider litigation against certain programs because the issues to be litigated are not sufficiently developed and lack any factual basis to permit an informed judicial opinion, Federal resources should not be expended on a futile effort to produce informed agency environmental analysis on those unwieldy, amorphous programs. As the Supreme Court stated in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967) and quoted in *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726, 732-33 (1998), "the ripeness requirement is designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and to protect the agencies from judicial interference *until an administrative decision has been formalized and its effects felt in a concrete way* by the challenging parties'" (emphasis added). Many programs for which EISs are now prepared do not contain any "formalized" "decisions" and certainly do not authorize actions that will have any "effects" on either the environment or potential litigants. As NEPA does not provide a definition for "Federal action" or contain an independent judicial review provision, "Federal actions" for purposes of NEPA should be synonymous with the courts' interpretation of Federal actions ripe for judicial review under the Administrative Procedure Act.

From a practical, as well as a legal, standpoint, CEQ should excuse from NEPA "programmatic" documentation pre-decisional planning or other documents that cover such broad geographical areas and so many unknown projects — so distant from ultimate decisionmaking — as to be unsusceptible or poorly susceptible to NEPA-related environmental analysis. Moreover, any informative value of analysis on such expansive and remote agency ruminations is wholly incommensurate with its cost. Among the "programs" with which we are most familiar, we would suggest that the Interior Columbia Basin Ecosystem Management Project and the Sierra Nevada Framework Plan qualify as just such pre-decisional plans for which NEPA documentation is not well suited.

In the same vein, it borders on the ridiculous when a final project for which NEPA compliance is required is preceded by multiple "programmatic" NEPA documents. At a minimum, the CEQ should require that agencies develop (subject to CEQ approval) NEPA compliance strategies that result in a maximum of one layer of "programmatic" NEPA compliance above the project level.

Suggestions for Tiering. Since "tiering" has been so unsuccessful, perhaps programmatic NEPA documentation should be limited to those situations where there will be no subsequent "Federal action" subject to NEPA analysis, *i.e.*, where the future projects do not rise to "major Federal actions significantly affecting the quality of the human environment" requiring EISs under NEPA § 102(2)(C) and, as we suggest below, no longer are subject to any EA preparation requirement. If the "program" is the only opportunity to conduct NEPA-related analysis, then it should be considered *the* "Federal action" under NEPA § 102(2).

As recommended above, to make tiering both acceptable and workable, the CEQ should require that no more than two NEPA documents be prepared for or applicable to any Federal project or other agency action.

Should tiering continue to be to be done and EAs to be maintained as a NEPA compliance requirement, then tiering ought to be limited to situations where the project-level NEPA documents will likely be EAs. When it is clear that full-fledged EISs will be required on one or more projects under a "program" even if an EIS were to be prepared on the program, then no programmatic EIS should be required. The efficiencies sought in tiering are unattainable if multiple EISs are involved. Tiering is virtually impossible in these circumstances; the projects' EISs almost invariably become stand-alone documents or gain little of value from the programmatic EIS analysis.

To make tiering successful, CEQ should establish (and thereby obtain judicial deference for) two policies. First, CEQ should require that the EA for any project subject to a program with a programmatic NEPA document not be a stand-alone document or repeat any analysis from the programmatic NEPA document.

Second, CEQ should insist that the programmatic NEPA document be considered timely for tiering purposes for a significant period after its completion. At a minimum, CEQ should establish a strong presumption of timeliness, with a heavy burden of proof to show that a programmatic NEPA document is too outdated to permit tiering.

"F. Additional Areas for Consideration."

This topic included text specifically inviting comments on the EA process. We will address EAs, but also the content of EISs (programmatic and project-related), timing of EIS and EA preparation, and the emergency/alternative arrangement process.

EIS Contents. Increasingly few EISs — programmatic or project-related — that are less than encyclopedic and inordinately costly to prepare can withstand judicial scrutiny in the face of the very vague, open-ended analytical requirements established by CEQ in rules and guidance. These are largely problems of CEQ's own making. Those who are tasked with preparing the EIS are left with virtually no guidance on the critical decision of "where to stop" in the analysis of effects. The result, of course, is that such weighty tomes are prepared that no one (including the agency officials who must make the final decisions on the Federal actions to which the EISs apply) ever reads them cover-to-cover

(excepting, perhaps, the lawyers and consultants for the parties who will litigate the documents' validity).

Section 102(2)(C) requires the analysis of the "environmental impact" and "environmental effects" "*of the proposed action*" (emphasis added). Yet, the CEQ, aided and abetted by the courts, (or vice-versa) has required analysis of "connected actions" and "cumulative impacts" of unconnected actions. 40 C.F.R. §§ 1508.7, 1508.9, 1508.25, 1508.27. It may well be that judicial decisions on the extent of analysis required for connected actions and cumulative effects are based primarily on the CEQ regulations and guidance. If so, CEQ should consider eliminating these mandated analyses as contrary to the plain meaning of NEPA, which requires analysis of only the Federal action's impacts (in the same manner in which CEQ eliminated the worst-case analysis requirement). If the case law purports to interpret NEPA and not CEQ's rules and guidance and appears not to be refutable (as is more likely the case for "connected actions" arising from the highway lawsuits), then CEQ should certainly limit the scope of those analyses by rulemaking.

Although certainly no model for the extent to which the analyses should be restricted, the history of cumulative effects analysis under the Endangered Species Act (ESA) is informative. There, a pro-active Interior Department issued a Solicitor's Opinion in 1981 (M-36938, 88 I.D. 903, August 27, 1981) that substantially reduced the scope of cumulative effects analysis (eliminating effects of future federal projects and projects that were speculative) in consultations under ESA § 7(a)(2), and followed it with an amendment to the join rule of the Fish and Wildlife Service and National Marine Fisheries Service defining cumulative effects. 50 C.F.R. § 402.02; 51 Fed Reg. 19926, 19958 (June 3, 1986). Although that effort was based in part on a distinction between the ESA and NEPA drawn by the courts, the Solicitor (citing the judicial opinions), and the preamble to the rule (51 Fed. Reg. 19932-19933), it still is instructive as to the potential for shaping a more efficient impacts analysis in NEPA documents.

The CEQ should also address the geographical scope of the effects analysis in NEPA documents. CEQ's present guidance is of no help whatsoever. The CEQ rule (40 C.F.R. § 1502.4(c)(1)) merely suggests "body of water, region, or metropolitan area" for possible analysis. The "region" could be the western United States; the body of water could be the Mississippi River. Watersheds seem to be increasingly popular geographical units for analysis, but those too can be anything from the watershed of "Brush Creek" to the watershed of the Mississippi River, which could include the entire land mass between the Rocky Mountains and the Appalachians. With so little assistance from CEQ's rule, it may well be enough for any plaintiff to suggest even a single speculative impact beyond the area chosen for the effects analysis to invalidate the entire NEPA document. Certainly the lack of guidance tempts those preparing a NEPA document to expand the effects area to cover the most improbable of impacts, thereby increasing substantially and unnecessarily the preparation time for, and cost and size of, that document.

Environmental Assessments. We question whether NEPA requires the preparation of EAs. We recognize that a mechanism must be in place to determine whether an agency action is a "major Federal action[] significantly affecting the quality of the human environment" and thus requires preparation of an EIS under NEPA § 102(2)(C). At most, that mechanism could be a FONSI that looks solely at the impacts of the proposed agency action, and not to alternatives to the action. If a

programmatic EIS is prepared, it could incorporate a general FONSI for all or a class of projects under the program.

We are aware that CEQ and the courts under the "hard look" doctrine have grounded the EA requirement in NEPA § 102(2)(E). *See, e.g.*, 40 C.F.R. § 1508.10. However, all that clause requires is that the agency "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." Unlike NEPA § 102(2)(C), that clause does not require "a detailed statement" or analysis of the environmental impacts of the proposal (notably, even § 102(2)(C) does not require analysis of the environmental impacts of the alternatives to the proposed Federal action). As previously noted, if a program has been analyzed in a programmatic EIS, then that programmatic EIS could include — "study, develop, and describe" — generic alternatives to all projects under the program that do not constitute "major Federal actions significantly affecting the quality of the human environment" — thus discharging any agency obligations under § 102(2)(E) and the need to prepare project EAs. Even if the projects are not developed under a program accompanied by a programmatic EIS, new simplified requirements for the contents of project EAs should be developed by CEQ to ensure that EAs are not, as they now are, "detailed statements" which are required only for EISs on major Federal actions under § 102(2)(C). To emphasize, even if EAs are written in accordance with CEQ rules and guidance (and are not bloated to "bullet proof" them from litigation), they undeniably have become, and by statute should not be, "detailed statements."

If CEQ determines that EAs should be maintained as a NEPA compliance tool, it should develop new requirements for those documents that differ fundamentally in organization and contents from the requirements for EISs (and not simply repeat the requirements of an EIS for an EA, qualified only by the hortatory wording "brief discussions of," as does the present CEQ rule: 40 C.F.R. § 1508.9(b)). This would do more than simply ensure that, even when written properly, EAs do not constitute "detailed statements." An equally significant advantage of differentiating unequivocally the organizational and textual requirements of EAs from those for EISs (rather than retaining requirements that make EAs stripped-down versions of EISs, or, as Judge Posner put it, "rough-cut, low-budget environmental impact statement[s]," *Cronin v. U.S. Department of Agriculture*, 99 F.2d 439,443 (7th Cir. 1990)) is that such an action might eliminate or at least reduce the tendency of — indeed, the temptation for — the officials responsible for NEPA documentation to write EISs in EA clothing. To ensure that "document creep" (from an EA to a pseudo-EIS) does not occur, the rules and guidance should not only reorganize and simplify the analytical requirements of an EA, but also contain explicit statements that certain analyses are appropriate only for EISs and are not to be conducted for or included in EAs.

EAs have been subjected to more than just excessive paperwork; they also have become immersed in excessive procedures. Again, as with the contents, so with procedures, EAs have become EIS wannabes. The procedures for public participation are a prime example of procedural excess. NEPA § 102(2)(C) does not even require public participation for or comments on EISs. Indeed, all the law requires is that "copies of such statement [notably, not a *draft* EIS] and the comments and views of appropriate Federal, State, and local agencies which are authorized to develop and enforce environmental standards, shall be made available ... to the public," citing the Administrative Procedure Act provision for how the public is to be notified of the document's existence and provided document

copies. Lately, the Forest Service, an agency with considerable NEPA experience, frequently has been duplicating the CEQ regulatory (not statutory) public participation procedures for *EISs* in processing *EAs* — including scoping sessions, comments on *draft* EAs, and post-EA comments, with written agency responses (*see League of Wilderness Defenders v. Forsgren*, 184 F. Supp. 2d 1058 (D. Ore. 2002)). This makes the EA procedurally all but identical to the EIS (with procedure self-imposed by the Executive Branch — by regulation of a White House agency for EISs and by idiosyncratic decisions of individual line agency officials for EAs) ... and prolongs the process considerably. The value of such procedural excess appears minimal. (For example, the Forest Service was still sued and still lost in *League of Wilderness Defenders*; the opponents were not mollified or convinced otherwise by the extra public comment, and the judge was not impressed at all by the agency's self-inflicted, heightened public participation opportunities.)

We question whether any public comment is required for EAs, particularly when its not required for EISs by NEPA or for EAs by CEQ's rules. Indeed, CEQ's regulations simply direct the agency proposing the action to include the public "to the extent practicable" during EA preparation. 40 C.F.R. § 1501.4(b). Certainly, "to the extent practicable" should be no more than is required by NEPA for EISs — making available to the public copies of (in this case) EAs.

We also believe the FONSI — when it is not a stand-alone document without an underlying EA, as suggested above — should be integrated into the EA, thereby eliminating a sequential procedure and presumably providing the textual context and justification for the "Finding."

Whether or not the two documents are integrated and thereby enhance the reasoning of the FONSI, CEQ also should set criteria for the "convincing statement of reasons" why no EIS is required that the Ninth Circuit (and likely other circuits) requires of a FONSI (and finds lacking in too many cases). The present CEQ guidance — "briefly describing the reasons why an action ... will not have a significant effect on the human environment and for which an [EIS] will not be prepared" — is apparently insufficient for at least some courts. 40 C.F.R. § 1508.13.

More than that, CEQ should provide complete direction on the full contents of FONSIs. Although CEQ has not been shy about prescribing the contents of EISs and EAs, it has been strangely silent on what FONSIs should contain.

Finally, CEQ should reconsider the "kick out" criteria for both categorical exclusions (to EAs) and EAs (to EISs). We will discuss this below when we address categorical exclusions.

Supplemental EISs and EAs. With increasing frequency, agencies are undertaking on their own volition, or courts are ordering, preparation of supplemental NEPA documents. In most instances, these supplemental documents — EISs or EAs — provide little of value in analysis compared to the cost in time, funds, and personnel incurred in writing them. Moreover, if these supplemental documents relate to private sector activities on public or private lands, they can, by prolonging the decisionmaking process, or worse, reopening previous decisions, to place at risk investments, and the employment and public sector revenue benefits derived from those investments.

We believe CEQ should establish a set of criteria to govern those circumstances in which supplemental NEPA documentation is required. The agency should be required to assess publicly and in writing the validity of the new information which is alleged to create the supplementation obligation. At a minimum, the information should meet the standard for data reliability established by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Secondly, the agency should place the information through several screens to eliminate premature commitment to unnecessary additional NEPA paper chases, including whether the information discloses substantial, irreparable, and permanent environmental injury, beyond any adverse environmental effects analyzed in the previous NEPA document; whether the effects can not be mitigated by the agency without further NEPA analysis; and whether the benefits outweigh the costs of preparing supplemental NEPA documentation. CEQ should also limit those circumstances where all or parts of programs or projects are suddenly frozen when the decision to supplement is made and remain so for the duration of the preparation of the supplemental documents. We suggest that such paralysis should be inflicted only when it is clear that the substantial, irreparable, and permanent environmental injury would occur *before* publication of those documents.

Finally, we urge the CEQ to bar supplemental EAs. If the new information does not reveal the possibility of environmental harm of sufficient severity to make a Finding of No Significant Impact unlikely, further NEPA analysis would be make-work.

Time Limits. The CEQ has consciously chosen not to set general time limits for NEPA document preparation either by category of document (*e.g.*, programmatic EIS, project EIS, programmatic EA, project EA, tiered EA, etc.) or by type of action (similar perhaps to the Environmental Protection Agency's delineation of actions covered by general permits versus actions requiring individual permits under the Clean Water Act). 40 C.F.R. § 1501.8 (first introductory sentence). And, CEQ has given permission to the other agencies to establish time frames only for "individual actions." 40 C.F.R. §§ 1501.7(b)(2), 1501.8. To set time frames for NEPA documentation for categories of actions would not necessarily be the Herculean task it might first appear, since over two-thirds of all EISs are prepared by just four agencies — Forest Service, Bureau of Land Management, Department of Transportation, and Army Corps of Engineers — with a relatively discrete number of action categories. *The National Environmental Policy Act — The Study of Its Effectiveness After 25 Years*, CEQ (Jan. 1977). Should the CEQ choose to set deadlines by types of NEPA documents, as a potential model it could look to the deadlines established by the Fish and Wildlife Service and National Marine Fisheries Service for processing different types of habitat conservation plans/incidental take permit applications in their *Habitat Conservation Planning Handbook* (Nov. 1996), pp. 1-10 through 1-14.

Emergencies. AF&PA believes that the CEQ should develop a better process for determining when circumstances are "emergencies" and selecting the "alternative arrangements" for NEPA compliance for the responsive Federal actions. 40 C.F.R. § 1506.11. The present emergency provision of the CEQ regulations is so unwieldy as to be virtually useless. Every decision under the rule is made individually and with no guiding criteria or templates. This idiosyncratic decisionmaking requires extensive paperwork and CEQ/agency negotiations at the very time when on-the-ground action is of the essence.

The CEQ has, by regulation, tasked the agencies with developing "criteria" to identify "classes of action" suitable for categorical exclusions, for EAs, and for EISs. 40 C.F.R. § 1507.3. It should do the same for circumstances that automatically qualify as emergencies warranting alternative arrangements. Moreover, it should not devise each alternative arrangement separately, but, instead, develop template procedures for each class of actions to address emergencies. This will allow the affected agency immediately to determine if a circumstance qualifies as an emergency and to promptly launch on-the-ground actions in accordance with the template alternative arrangement for that class of actions.

Moreover, we believe that the criteria CEQ should develop for identifying emergencies should be broadened to include any circumstances where delay would result in failure to respond in a timely manner to adverse environmental consequences resulting from fire, windstorms, disease or insect infestations or other natural calamities. Classic examples of these circumstances are the recent fires in lodgepole pine forests on Federal lands. The dead trees of this species decay so quickly that they lose commercial value and cannot be salvaged if they must proceed through a prolonged NEPA process and any subsequent litigation over the adequacy of NEPA compliance. As long as the dead trees remain upright they constitute a severe safety risk to recreationists. (Forest Service officials on the two Arizona national forests that suffered from the Rodeo-Chediski Fire have stated that this highly popular national forest recreational area on the Mogollon Rim may be closed to the public for five to ten years in the absence of aggressive removal of the standing dead trees.) As the dead trees fall they inhibit access to the land for stabilization and restoration projects and any future fire control. Indeed, the downed, dead timber produces a type of fuel loading that, if ignited, burns horizontally with such great intensity and duration that it typically sterilizes the soil and makes it water repellant — ensuring little or no regrowth for decades and serious flooding and erosion damage to riparian areas. If these dead trees are not removed by private sector salvage operations, they likely will not be removed at all, since there simply are not enough appropriated funds for the land management agencies to undertake the removal tasks themselves.

The criteria for classes of actions in responses to emergencies that are eligible for alternative arrangements must include actions with short time fuses and perhaps temporary environmental consequences, but promise long-term environmental benefits and possible avoidance of long-term environmental harm.

"E. Categorical Exclusions."

We have already suggested that categorical exclusions could be broadened for low-effects projects under programs that are subject to programmatic EISs.

However, as suggested earlier, we think the most important contribution that CEQ can make to ensure that vitality is restored to the categorical exclusion concept is to reconsider the "kick out" criteria that lift any action from categorical exclusion status to imposition of an EA. The CEQ rules contain several troublesome criteria that define "significantly" and thereby require an EA in lieu of applying a categorical exclusion (or substitute an EIS for an EA). The two most problematic criteria are effects on

the environment that are "highly controversial" and "highly uncertain or involve unique or unknown risks." 40 C.F.R. §§ 1508.27(b)(4) and (5) and 1508.4. No matter how often the CEQ asserts that "controversial" does not mean the level of opposition to the Federal action but rather scientific disputes over the projected effects, the agencies quickly abandon the categorical exclusion option as soon as any organized grumbling is heard. And, few agencies have the stomach to place any weight on the "highly" modifier of "controversial." Similarly, since site conditions for even the most frequently repeated actions always differ, any advocate worth his or her salt can allege uncertainty or unique risks, again artfully dodging the supremely vague "highly" modifier.

Indeed, the vagueness of the "kick out" criteria reaches truly heroic proportions with the phrase: "The degree to which the action ... represents a decision in principle about a future consideration." 40 C.F.R. § 1508.27(b)(6). We find that phrase indecipherable.

The "kick out" criteria become truly counterproductive when they include "beneficial" impacts. We have difficulty comprehending why CEQ would state as a reason for denying categorical exclusion status (or for that matter switch an EA to an EIS) that "[a] significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." 40 C.F.R. § 1508.27(b)(1).

We urge CEQ to reconsider fully the "kick out" criteria and develop a narrower set of criteria to proscribe particular categorical exclusions that is based solely on science and the expected level or degree of adverse effects.

To the more important point, CEQ should consider developing a set of criteria — a checklist that is not subjective — for agencies to determine whether an action or class of actions is eligible for categorical exclusion — if you will, "kick in" rather than 'kick out" criteria. The CEQ might adopt a criteria development exercise similar to that followed by the Environmental Protection Agency in establishing eligibility criteria for general permits under the Clean Water Act (CWA) — for example, the multi-step self-certification process for endangered species' presence or absence used by CWA § 404 permit applicants to determine whether a general § 404 permit is applicable or an individual permit is required.

"D. Adaptive Management/Monitoring and Evaluation Plans."

We support — with only two, but major caveats — incorporation of the concept of adaptive management into the NEPA documentation process. We see that concept as perhaps the most workable method to reduce NEPA's "up-front" data and analytical requirements — requirements that breed the expectation in both agency officials and judges that the NEPA documents must be omniscient. That expectation transformed into a *de facto* administrative or judicial standard ensures that the NEPA document will arrive at the printer and the court suffering from analytical bloat and creates the potential to ultimately render the document legally invalid. Adaptive management, properly applied, could reduce the likelihood of these undesirable consequences.

Our first caveat is that adaptive management should not result in a subsequent denial of rights or imposition of additional costs on a private sector party after the decision accompanying the original

NEPA document is made. If adaptive management can be used as a means of halting or drastically altering any action by a private party permitted by, or implementing, a federal agency decision that has already undergone NEPA analysis, it will raise economic insecurity to such a level that it could dampen interest in any economic activity requiring federal agency authorization or sponsorship.

We suggest that any application of the adaptive management concept to NEPA should be done in a manner similar to the use of the concept in incidental take permitting under section 10(a)(1)(B) of the Endangered Species Act. There, the previous Administration adopted, and the Bush Administration is vigorously defending against judicial attack, the "No Surprises" policy that ensures a landowner receiving an incidental take permit will not be required to preserve any more land or expend any more funds to protect endangered or threatened species covered by the permit to meet unforeseen circumstances. Adaptive management is allowed, even encouraged, but only consistent with the No Surprises policy — that is the
permit applicant must voluntarily agree to the adaptive management terms in documentation accompanying the permit (in the habitat conservation plan or the implementing agreement). *E.g.*, 50 C.F.R. §§ 17.22(b)(5) and 17.32(b)(5). We could accept, even welcome, adaptive management in the NEPA process only if it is so circumscribed under NEPA processes either for permits and other authorizations from federal agencies to private parties or for federal agency actions implemented by private parties.

We also are concerned that, when adaptive management is determined necessary, it may be at a much larger scale than, and even at a different geographical location from, the project that was subject to the original NEPA document. We have no easily suggested solution to this problem. But, again, we would look to assurances that any project involving a private party is not made to undergo ill-fitting adaptive management simply because it happens to be the only action which is subject to federal jurisdiction.